Supreme Court
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No.

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IN THE

Supreme Court of the United States

MEDIA GENERAL, INC.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX VOLUME I

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QUESTIONS PRESENTED

1. Whether this Court should reconsider its ruling in *FCC v. National Citizens Comm. for Broad.* ("*NCCB*"), 436 U.S. 775 (1978), based on *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), that broadcast "scarcity" allows only rational basis review under the First Amendment of newspaper/broadcast cross-ownership restrictions, and that such restrictions survive First Amendment scrutiny.

2. Whether this Court should reconsider its ruling in *NCCB* that broadcast ownership restrictions targeted at a single non-broadcast medium, newspapers, are subject only to rational basis review under the First Amendment and the equal protection component of the Fifth Amendment, and that such restrictions survive First and Fifth Amendment scrutiny.

3. Whether this Court should reconsider its ruling in *NCCB* that newspaper/broadcast cross-ownership restrictions specifically directed at promoting "diversity" are content neutral, and thus are subject only to rational basis review under the First Amendment, and that such restrictions survive First Amendment scrutiny.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Media General, Inc. states that (i) it has no parent corporation; (ii) affiliates of Gabelli Asset Management, Inc. own 25.8% of its outstanding publicly traded stock; and (iii) no other publicly held company owns 10% or more of its stock.

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INTRODUCTION

In an age when the First Amendment has been interpreted to protect such activities as nude dancing and cross burning, this case calls for a return to basics. At issue here is a content-based restriction on speech: the Federal Government, for the avowed purpose of promoting broadcast "diversity," is restricting the ability of newspaper owners, like petitioner Media General, to acquire broadcast stations in the communities they serve. Those restrictions directly abridge Media General's First Amendment right to deliver enhanced quality local news to those communities.

But for the fact that broadcast speech is involved, there would be no question that these content-based restrictions would be subject to heightened judicial scrutiny: in a free society, the Government is not in the business of muzzling certain voices for the avowed purpose of enhancing others. Under current jurisprudence, however, restrictions on broadcast speech are subject only to rational basis review. *See, e.g., Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) ("*NCCB*"). Applying that hyper-deferential standard of review, the Third Circuit below not only affirmed an order of the Federal Communications Commission ("FCC") retaining newspaper/broadcast cross-ownership restrictions, but actually remanded that order to the extent it sought to relax those restrictions. That decision highlights the need for this Court to reexamine its jurisprudence in this area in three vital respects.

First, it is high time to revisit the doctrine of broadcast "scarcity" embraced by this Court in *Red Lion* as the basis for deferential judicial review of broadcast regulation. Over the past generation, there has been a communications revolution, with an explosion of new media sources and outlets. The law, however, has remained frozen in a pre-revolutionary state based on *Red Lion*. Given our hierarchical judicial system, the lower courts are in no position to adapt to the change, even though the

FCC itself has long since repudiated the underlying premise of broadcast "scarcity." Rather, the lower courts are forced to state—as did the court below—that they are constrained by this Court's precedents, and that it is this Court's prerogative to address the ongoing vitality of those precedents. Accordingly, there is no prospect of lower-court percolation on these issues, and this Court alone has both the opportunity and the responsibility to reconsider its outmoded precedents.

Second, just as it is high time to reconsider *Red Lion*'s "scarcity" doctrine applicable to broadcast regulation generally, it is high time to reconsider *NCCB*'s related holding with respect to newspaper/broadcast cross-ownership restrictions specifically. Although those restrictions uniquely target a single non-broadcast medium, newspapers, *NCCB* dismissed a constitutional challenge to such differential treatment by asserting that newspaper owners were treated "in essentially the same fashion as other owners of the major media of mass communications," 436 U.S. at 801—*i.e.*, owners of radio and television broadcast stations, who also were restricted in their ability to own multiple stations. Again, the Third Circuit below declared that it was bound by that holding, and again, that holding simply cannot be squared with current technological or regulatory reality. Today there are multiple other "major media of mass communication" not covered by broadcast ownership restrictions, including—most obviously—cable television and the Internet. When owners of cable television stations and Internet sites are free to buy broadcast stations at will, it is evident that the FCC's newspaper/broadcast cross-ownership restrictions are wildly underinclusive, and newspaper owners are being singled out for disfavored treatment. Accordingly, heightened judicial scrutiny of the restrictions is warranted on this ground alone.

And *third*, it is high time to reconsider *NCCB*'s holding that newspaper/broadcast cross-ownership restrictions "are not content related." The very *premise* of the restrictions is that

they will affect the content of broadcast speech, by promoting "diversity." Regardless of the validity of that premise, there can be no dispute that it is explicitly content-based. Content-based restrictions on speech, however—even in the broadcast context—are subject to heightened scrutiny, *see, e.g., FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 383-84 (1984), and *NCCB*'s unexplained contrary holding on this score stands out as an anomaly.

In short, the time has come for this Court to revisit the outdated and untenable premises that compelled the Third Circuit to give Media General's constitutional challenge the back of the hand. Because those restrictions cannot remotely survive heightened scrutiny, and were not subjected to such scrutiny below, this Court should grant certiorari, clarify the appropriate standard of review, and invalidate the restrictions.

OPINIONS BELOW

The Third Circuit's decision is reported at 373 F.3d 372 and reprinted in the Appendix ("App.") at 1-190a. The FCC order under review is reported at 18 F.C.C.R. 13,620 and 2003 WL 21511828 (2003), and reprinted at App. 206-658a.

JURISDICTION

The Third Circuit rendered its decision on June 24, 2004, App. 2a, and denied a timely petition for rehearing on September 3, 2004, App. 191-93a. Justice Souter extended the time to file this petition to and including January 31, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The First Amendment provides in pertinent part: "Congress shall make no law ... abridging the freedom of speech, or of the press ...."

The Fifth Amendment provides in pertinent part: "No person shall be ... deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. The History Of Media Cross-Ownership Restrictions And The Telecommunications Act Of 1996

The origins of this case go back to 1975, when the FCC issued an order prospectively barring any person or entity that owned a newspaper in a particular community from buying a broadcast station in that community. *See In re Rules Relating to Multiple Ownership of Standard, FM, & Television Broad. Stations*, 50 F.C.C.2d 1046 (1975), *codified at* 47 C.F.R. §§ 73.35, 73.240, 73.636 (1976).

That order was promptly challenged on both First Amendment and Equal Protection grounds, but this Court rejected those challenges. *See NCCB*, 436 U.S. 775. The Court acknowledged that the FCC's rulemaking record was "inconclusive[]" with respect to the alleged link between diversity of broadcast ownership and the "hoped-for" diversity of broadcast viewpoints, but (applying the deferential standard of review from *Red Lion*, 395 U.S. 367) held that the Commission had acted "rationally" in concluding that "diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." 436 U.S. at 786, 796. The Court also asserted that the newspaper/broadcast cross-ownership ban was "not content related," *id.* at 801, and that it did not unconstitutionally single out newspaper owners because "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications," *id.*

The decades following *NCCB* witnessed explosive change in telecommunications and media, and Congress responded by enacting the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). That Act implemented a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services

to all Americans by opening all telecommunications markets to competition." H.R. Rep. No. 104-458, at 1 (1996). The Act thus relaxed or abolished several existing restrictions on broadcast ownership, and instructed the FCC to review its remaining ownership restrictions every other year "to determine whether any of such rules are necessary in the public interest as the result of competition." 1996 Act § 202(h). The Act further directed the Commission, in the course of that review, to "repeal or modify any regulation it determines to be no longer in the public interest." *Id.*

Pursuant to this mandate, the FCC in 2001 issued a Notice of Proposed Rulemaking regarding its newspaper/broadcast cross-ownership rule, solicited comments from interested parties, and compiled a voluminous record. *See In re Cross-Ownership of Broadcast Stations and Newspapers*, 16 F.C.C.R. 17,283 (2001). The Commission subsequently initiated an omnibus proceeding to consider all its broadcast ownership rules and consolidated the newspaper/broadcast cross-ownership proceeding with that new docket. *See In re Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 17 F.C.C.R. 18,503 (2002). Many interested parties, including petitioner Media General, Inc., filed comments.

B. Petitioner Media General And Its Convergence Strategy

Media General, a publicly owned communications company based primarily in the southeastern United States, has an intense interest in the fate of the FCC's newspaper/broadcast cross-ownership restrictions. The company owns a variety of media outlets, including newspapers, broadcast television stations, interactive media, and diversified information services. In Tampa/St. Petersburg, Florida, Media General owns both a television station and a newspaper by virtue of "grandfathering" prior to the 1975 cross-ownership ban. In four other media

markets, Media General currently owns both a broadcast station and a newspaper by virtue of the FCC's position that a broadcast station owner is allowed to buy and hold a newspaper until the station's next license renewal.

In operating these newspaper/broadcast cross-ownerships, Media General has become one of the media's leading practitioners of "convergence," the melding of newspaper, broadcast television, and online resources in the preparation and dissemination of local news. In Media General's experience, ownership of multiple media outlets in a particular market enhances its ability to provide enhanced and insightful local news coverage that distinguishes its news outlets and attracts consumers. Its Tampa News Center is the most advanced convergence laboratory in the Nation, and the only one where a newspaper, a television station, and an online division are located together under one roof. Thus, as Media General explained in its comments to the FCC, convergence has allowed the company to pool its resources for news gathering, and thereby deliver better, faster, and deeper local news.

C. The FCC Order Under Review

The FCC, however, rejected Media General's call to repeal all newspaper/broadcast cross-ownership restrictions. As an initial matter, the Commission dismissed Media General's argument that any regulation in this area must satisfy heightened scrutiny. App. 218a. As the Commission explained, "courts have considered and consistently rejected the arguments for a stricter standard of First Amendment scrutiny of broadcast regulation .... Accordingly, the rational basis test continues to apply to our ownership rules." *Id.* In addition, the Commission specifically rejected Media General's argument that the cross-ownership rule, given its explicit diversity rationale, was "inherently content based." *Id.* According to the Commission, "[a]s the Supreme Court noted in *NCCB*, the cross-ownership rules at issue were 'not content related.'" *Id.* (quoting *NCCB*, 436 U.S. at 801).

Rather than repealing all newspaper/broadcast cross-ownership restrictions, the FCC instead relaxed those restrictions somewhat. In markets with three or fewer broadcast television stations, the Commission retained the absolute ban. App. 521a. In markets with nine or more broadcast television stations, the Commission lifted all restrictions. App. 534a. And in markets with four to eight broadcast television stations, the Commission adopted a graduated approach, allowing a single entity to own a newspaper and either (a) one television station and up to 50% of the radio stations that may be commonly owned in that market under the Commission's local radio rule, or (b) up to 100% of the radio stations allowed under the local radio rule. App. 530-31a. These new regulations still restricted newspaper/broadcast cross-ownership in more than half of the Nation's media markets, which have eight or fewer broadcast television stations. In drawing these lines, the Commission looked to a so-called "Diversity Index" that purported to quantify "diversity." *See id.* at 479-508a.

The consolidated order also addressed five other broadcast ownership rules: (1) the local television ownership rule, App. 289-367a; (2) the local radio ownership rule, App. 367-429a; (3) the radio-television cross-ownership rule, App. 465-79a; (4) the national television ownership rule, App. 552-610a; and (5) the dual network rule, App. 610-29a.

D. The Third Circuit Proceedings

Media General and other media companies (collectively the "Deregulatory Petitioners") promptly filed petitions for review of the FCC's order in the D.C. Circuit, which had previously reviewed—and remanded—two of the media ownership rules addressed in the order. *See Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002). A number of public interest and consumer advocacy groups (collectively the "Regulatory Petitioners"), however, filed petitions for review in other circuits, thereby triggering a lottery under 28 U.S.C.

§ 2112(a). That lottery randomly assigned all of the petitions for review to the Third Circuit.

The Regulatory Petitioners promptly moved for a stay of the FCC order, which the Third Circuit granted. App. 194-96a. Even though the Regulatory Petitioners could not show any immediate and/or irreparable injury from the FCC order (since it did not actually authorize any particular transaction), the court declared that "[t]he harm to [the Regulatory Petitioners] absent a stay would be the likely loss of an adequate remedy should the new ownership rules be declared invalid in whole or in part." App. 195a.

By a divided vote, the Third Circuit panel then denied the Deregulatory Petitioners' motion to transfer the case to the D.C. Circuit, which had previously reviewed and remanded two of the media ownership rules consolidated by the Commission. App. 197-205a. As the motion explained, never before had a court randomly selected to review an agency decision on remand from another court refused to transfer the case to the remanding court. Chief Judge Scirica dissented, emphasizing "the fundamental jurisprudential underpinning that agency decisions on remand should be reviewed by the remanding court." App. 203a (citing *Public Serv. Comm'n v. FPC*, 472 F.2d 1270, 1272 (D.C. Cir. 1972)). The Deregulatory Petitioners sought *en banc* review of the refusal to transfer, but the panel majority (again over Chief Judge Scirica's dissent) refused even to refer the matter to the *en banc* court.

The same divided panel of the Third Circuit subsequently ruled against the Deregulatory Petitioners virtually across the board, and remanded much of the FCC order for going too far in a deregulatory direction. App. 1-107a.

With respect to the newspaper/broadcast cross-ownership restrictions, the Third Circuit first rejected the Deregulatory Petitioners' argument that both the First Amendment and the equal protection component of the Fifth Amendment mandate

heightened judicial scrutiny of the FCC's order. According to the court, the Deregulatory Petitioners' First Amendment challenge was "foreclosed" by this Court's decision in *NCCB*. App. 46a. "Due to the 'physical scarcity' of the broadcast spectrum," the court asserted, "the [*NCCB*] Court scrutinized the [cross-ownership] regulation to discern a rational basis." *Id.* The Third Circuit acknowledged the Deregulatory Petitioners' argument that the scarcity doctrine had been rendered obsolete by technological advances, but "decline[d] the[] invitation to disregard Supreme Court precedent." *Id.* Accordingly, the Third Circuit reviewed the FCC's newspaper/broadcast cross-ownership restrictions under "a rational basis standard," and held that "the Commission's continued regulation of the common ownership of newspapers and broadcasters does not violate the First Amendment rights of either." App. 47-48a.

The Third Circuit rejected the Deregulatory Petitioners' equal protection challenge to the differential treatment of newspapers on similar grounds. According to the court, that challenge too was "foreclosed" by *NCCB*, and the court again "decline[d] the ... invitation to disregard Supreme Court precedent because of changing times." App. 46a; *see also id.*("[I]t is the Supreme Court's prerogative to change its own precedent.") (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

The panel majority then proceeded to remand the revised newspaper/broadcast cross-ownership restrictions. Although the panel majority declared that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest," App. 40a, the panel majority proceeded to poke holes in the so-called "Diversity Index" to which the FCC looked in drawing the lines, *see* App. 48-63a. Accordingly, the panel majority remanded the new newspaper/broadcast cross-ownership restrictions "for the Commission to justify or modify its approach to setting numerical limits." App. 107a. The court

left in place its stay of the FCC order with respect to newspaper/broadcast cross-ownership, thereby effectively preserving the blanket 1975 ban. The panel majority also expressly retained jurisdiction over the proceedings on remand, *see id.*, thereby ensuring that any future challenges to any order would be channeled back not only to the Third Circuit, but to the same panel.

REASONS FOR GRANTING THE WRIT

I. This Court Should Reconsider Its Rulings In *Red Lion* And *NCCB* That Broadcast "Scarcity" Demands A Uniquely Deferential Standard Of Judicial Review Of Broadcast Regulations Under The First Amendment.

This case provides this Court with the opportunity to bring its First Amendment jurisprudence regarding government regulation of broadcast media into the twenty-first century. As this Court has acknowledged, "our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994). Thus, although broadcasting is a vital medium of speech in our modern society, government regulation of broadcasting—including the cross-ownership restrictions at issue here—is subject only to the deferential rational-basis judicial review generally applicable to government regulation of non-communicative economic activity. *See FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) ("*NCCB*"). Since this Court's decision thirty-six years ago in *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), that anomalous state of affairs has been justified under a theory of broadcast "scarcity." Even assuming that this theory was sound as an original matter, courts and commentators have recognized that it is not sound any longer. But, as the Third Circuit noted in the decision below, the lower courts are bound to apply *Red Lion*'s "scarcity" doctrine unless and until this Court reconsiders that doctrine. Media General now respectfully urges this Court to do just that.

A. This Court Adopted The Scarcity Doctrine In *Red Lion*, And Applied That Doctrine To The Newspaper/Broadcast Cross-Ownership Ban In *NCCB*, Based On The State Of Technology In The 1960s And 70s.

Thirty-six years ago, in *Red Lion*, this Court sharply limited judicial review of broadcast regulation under a theory of broadcast "scarcity." *See* 395 U.S. at 386-90. That theory is based on the premise that the broadcast spectrum is a "scarce resource" because "there are substantially more individuals who want to broadcast than there are frequencies to allocate." *Id.* at 388, 391. In order to prevent "overcrowd[ing of] the spectrum," the Court held that "the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.* at 389-90. Accordingly, the *Red Lion* Court rejected a First Amendment challenge to the FCC's so-called "fairness doctrine," which required broadcasters to give adequate coverage to public issues and ensure that coverage was fair and accurately reflected opposing views. *See id.* at 377-78. The *Red Lion* Court acknowledged, however, that technological advances might render the scarcity doctrine obsolete, and therefore rested its holding on "the present state of commercially acceptable technology." *Id.* at 388.

Nine years later, in *NCCB*, the Court applied *Red Lion*'s scarcity rationale in analyzing the FCC's 1975 ban on newspaper/broadcast cross-ownership. 436 U.S. 775. As the Court explained, "[t]he physical limitations of the broadcast spectrum are well known," and "[i]n light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential." *Id.* at 799 (citing *Red Lion*, 395 U.S. at 375-77, 387-88). Accordingly, the *NCCB* Court submitted the cross-ownership ban only to rational-basis review. In particular, the Court acknowledged that the evidence was "inconclusive" as to whether the ban would promote the

"hoped-for" viewpoint diversity, but accepted at face value the FCC's prediction that "[i]ncreases in diversification of ownership would possibly result in enhanced diversity of viewpoints." *Id.* at 786, 796-97; *see also id.* at 796 (holding that the FCC "acted *rationally* in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints") (emphasis added).

NCCB represented the high-water mark of the scarcity doctrine; over the ensuing generation, this Court has declined to extend that doctrine and pointedly noted that it has been widely criticized. Thus, in *FCC v. League of Women Voters of Calif.*, the Court observed that "[t]he prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years" in light of technological advances, but stated that "[w]e are not prepared ... to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. 364, 376 n.11 (1984).

A decade later, in *Turner*, this Court once again acknowledged that "courts and commentators have criticized the scarcity rationale since its inception." 512 U.S. at 638 & n.5 (citing courts and commentators). The Court noted, however, that it had "no reason" to revisit the rationale's validity in that case, which involved regulation of *cable*, not *broadcast*, television. *Id.* at 638. Thus, the *Turner* Court simply declined to extend *Red Lion* to cable regulation, while carefully refraining from any endorsement of *Red Lion* even in the broadcast context. *See id.* at 637 ("[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it,* does not apply in the context of cable regulation.") (emphasis added); *see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 812-13 (1996) (Thomas, J., concurring in the judgment in part and

dissenting in part) (noting that "[t]he text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so" despite the fact that such distinctions were "dubious from their infancy.").

The *Turner* Court specifically rejected the government's attempt to recast *Red Lion* as resting on a theory of "market dysfunction" independent of the physical characteristics of the broadcast medium. 512 U.S. at 639. To the extent that *Red Lion* could be so read, the Court held, it was no longer good law. "The justification for our distinct approach to broadcast regulation rests upon the unique *physical* limitations of the broadcast medium." *Id.* at 537 (emphasis added); *see also id.* at 640 ("[T]he special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence.").

Most recently, in *Reno v. ACLU*, 521 U.S. 844 (1997), this Court refused to extend *Red Lion*'s deferential standard of judicial review of broadcast regulation to the Internet. Again, the Court had no occasion in that case to consider the ongoing validity of the scarcity doctrine in the broadcast context, but emphasized that it would not extend that doctrine beyond that arena. *See id.* at 868.

Thus, it is fair to say, as has Judge Edwards of the D.C. Circuit, that "[a]lthough the Supreme Court has not declared the distinction between broadcast and other media a dead one, it has not lately given the distinction an enthusiastic endorsement. In fact, in recent years the Court has only grudgingly upheld the distinction." *Action for Children's Television v. FCC*, 58 F.3d 654, 674 (D.C. Cir. 1995) ("*ACT*") (*en banc*) (Edwards, C.J., dissenting).

B. The Lower Courts Have Criticized *Red Lion*'s Scarcity Doctrine, But Are Powerless To Jettison It.

Although this Court has not had the opportunity to reconsider the ongoing validity of the broadcast scarcity doctrine over the past generation, that issue has arisen with regularity in the lower courts—particularly the D.C. Circuit, where broadcast regulation is most often reviewed. And with regularity, the judges of the D.C. Circuit and other lower courts, from across the jurisprudential spectrum, have heaped criticism on the doctrine, noting in particular that it does not reflect the reality of the modern media world. By the same token, however, the lower courts (like the court below) have concluded that they are constrained to continue applying the doctrine unless and until this Court reconsiders *Red Lion*.

An early judicial critic of the scarcity doctrine was Judge Bork. Almost twenty years ago, he wrote:

> [T]he line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytic[al] tool ... inevitably leads to strained reasoning and artificial results. ... It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal

> fact as a distinguishing principle necessarily leads to analytical confusion.

Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986) ("*TRAC*"). Indeed, as Judge Bork noted for the *TRAC* Court, there is irony in this situation, because "[i]t appears that currently the number of broadcast stations ... rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried," and "many markets have a far greater number of broadcasting stations than newspapers." *Id.* at 508 n.4 (internal quotation omitted); *see also Loveday v. FCC*, 707 F.2d 1443, 1458-59 (D.C. Cir. 1983) (Bork, J.) (same).

Perhaps the most comprehensive critique of *Red Lion* to emerge from the D.C. Circuit, however, came from Judge Edwards, not generally noted for marching in lockstep with Judge Bork. Almost a decade ago, then-Chief Judge Edwards declared that "[i]n my view, it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast based on an indefensible notion of spectrum scarcity," and dissented from an *en banc* decision applying rationality review under *Red Lion* to broadcast regulation. *ACT*, 58 F.3d at 675 (Edwards, C.J., dissenting). As Judge Edwards explained:

> For years, scholars have argued that the scarcity of the broadcast spectrum is neither an accurate technological description of the spectrum, nor a 'unique characteristic' that should make any difference in terms of First Amendment protection. First, in response to the problem of broadcast interference when multiple broadcasters attempt to transmit on the same frequency, critics point out that this problem does not distinguish broadcasting from print and is easily remedied with a system of administrative licensing or private property rights. Another problem alluded to by the

> Court in *Red Lion* is the claim that the spectrum is inherently limited, in contrast to cable stations or newsprint. Today, however, the nation enjoys a proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum.

Id. (footnotes omitted). "In short, neither technological nor economic scarcity distinguish broadcast from other media." *Id.* at 676. Thus, relying on the scarcity rationale to justify rational basis review of broadcast regulations "makes no sense now," and "[i]t is time to revisit this rationale." *Id.* at 673, 675.

Other prominent judges, both on the D.C. Circuit and elsewhere, have pointedly noted and/or echoed this criticism. Judge Williams, joined by then-Chief Judge Edwards and Judges Silberman, Ginsburg, and Sentelle, declared that the "intense criticism" of *Red Lion* stems partly from "the perception that the 'scarcity' rationale never made sense—in either its generic form (the idea that an excess of demand over supply at a price of zero justifies a unique First Amendment regime) or its special form (that broadcast channels are peculiarly rare)"—and partly from "the growing number of available broadcast channels." *Time Warner Entm't Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (opinion dissenting from denial of rehearing *en banc*); *see also Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998) (noting "persuasive evidence that the scarcity rationale is no longer tenable"). Similarly, then-Chief Judge Arnold of the Eighth Circuit noted over a decade ago that "[i]n my opinion, there is a good chance that the legal landscape has changed enough since [*Red Lion*] to produce a different result." *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (*en banc*) (Arnold, C.J., concurring).

Unless and until this Court grants *certiorari* to reconsider *Red Lion*, however, the lower courts are constrained to continue

applying the scarcity doctrine, even as they reject its premise. As this Court has emphasized time and again, "it is this Court's prerogative alone to overrule one of its precedents," even if its reasoning has been rendered untenable. *Khan*, 522 U.S. at 20; *see also Hohn v. United States*, 524 U.S. 236, 252-53 (1998); *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

This point has not been lost on the lower courts—including the court below, *see* App. 46-47a—which dutifully (although often grudgingly) note that they have no choice but to continue applying the scarcity doctrine until this Court revisits *Red Lion*. As Judge Silberman colorfully put it for the D.C. Circuit, "[w]e are stuck with the scarcity doctrine until the day that the Supreme Court tells us that the *Red Lion* no longer rules the broadcast jungle." *Tribune*, 133 F.3d at 69; *see also Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002) ("[T]his court is not in a position to reject the scarcity rationale even if we agree that it no longer makes sense."); *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999) ("Although *Red Lion* has been the subject of intense criticism, it is still binding precedent.") (internal quotation omitted); *Arkansas AFL-CIO*, 11 F.3d at 1443 (Arnold, C.J., concurring) ("Whether the Supreme Court reexamines *Red Lion* is its business, not ours."); *Branch v. FCC*, 824 F.2d 37, 50 (D.C. Cir. 1987) (Bork, J.) ("[U]nless the [Supreme] Court itself were to overrule *Red Lion*, we remain bound by it.").

Given our hierarchical judicial system, this Court has not only the opportunity but the responsibility to reconsider *Red Lion* and the scarcity doctrine, and this case presents a perfect vehicle. Media General has dutifully raised this issue at every step along the way, and was specifically rebuffed by the Commission and the Third Circuit, both of which held that the challenged cross-ownership restrictions were subject only to

rationality review under *NCCB*. *See* App. 46-48a; 215-18a. The Commission thus made no effort to tailor its cross-ownership restrictions to meet heightened scrutiny, and the Third Circuit did not suggest that those restrictions could satisfy such scrutiny. That is no oversight: the cross-ownership restrictions are based on pure speculation about the link between ownership and diversity, and such speculation cannot remotely satisfy heightened judicial scrutiny.

C. The Time Has Come For This Court To Jettison The Scarcity Doctrine.

The time thus has come for this Court to jettison the scarcity doctrine. The broadcast medium is one of the most important sources of information and expression in our Nation, and the notion that government regulation of this vital medium is subject only to deferential rationality review (as if it were not subject to the First Amendment at all, but were simply run-of-the-mill economic regulation) is perverse. That point is particularly true in light of the communications revolution of the past generation. Not only has the broadcast spectrum itself expanded, but the line between broadcast and other video delivery systems has eroded. For instance, most Americans now view broadcast television channels via cable or satellite systems, *see Turner*, 512 U.S. at 633, App. 276-77a, and more Americans now watch cable and satellite channels than broadcast channels, *see* App. 284-86a. Given that most Americans probably would not know or care whether a particular television channel is transmitted by broadcast or some other video technology, it simply makes no sense to subject government regulation of broadcasting to a lesser degree of judicial scrutiny than government regulation of cable and other services. *See Turner*, 512 U.S. at 627 (noting "the increasing convergence between cable and other electronic media"); *cf. Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 76 (D.C. Cir. 1972) (Bazelon, C.J., dissenting)

(predicting that development of cable would "do away with technical scarcity" with respect to broadcasting).

Indeed, as noted above, this Court expressly premised the scarcity doctrine in *Red Lion* on the then-current state of technology, and did not remotely suggest that the doctrine should forever remain chiseled into constitutional law. In *Red Lion* and since, this Court has recognized the link between technology and the law in this area, and the need to keep the latter in line with the former. *See, e.g., CBS, Inc. v. DNC*, 412 U.S. 94, 102 (1973) (noting that "the broadcast industry is dynamic in terms of technological change," and that "solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence"); *see also id.* at 158 n.8 (Douglas, J., concurring in judgment) ("Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*. It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television."); *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 777 (1996) (Souter, J., concurring) ("[B]ecause we know that changes in ... regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow.").

Perhaps the most stinging, and telling, critique of the scarcity doctrine has come from none other than the FCC itself. Over a decade ago, the Commission jettisoned the fairness doctrine, and in so doing repudiated the scarcity doctrine. *See In re Compl. of Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *pet. for review denied*, 867 F.2d 654 (D.C. Cir. 1989). The Commission in that case specifically responded to this Court's invitation in *League of Women Voters* for a "signal" that it was time to reconsider the scarcity doctrine, 468 U.S. 376 n.11: "[I]n response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied

in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press." 2 F.C.C.R. at 5053.

As the Commission explained, "the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media." *Id.* at 5058; *see also id.* at 5048 ("[T]he extraordinary technological advances that have been made in the electronic media since the 1969 *Red Lion* decision, together with a consideration of fundamental First Amendment principles, provide an ample basis for the Supreme Court to reconsider the premise or approach of its decision in *Red Lion*."). In particular, the Commission noted that the number of broadcast television and radio stations had increased dramatically since *Red Lion*, and that "the advent and increased availability of such other technologies as cable and satellite television services have dramatically enhanced ... access" to "a multiplicity of media outlets." *Id.* at 5051. Thus, the Commission concluded, "[w]e simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity—be it spectrum or numerical—is irrelevant," and "the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press." *Id.* at 5053, 5055; *see also id.* at 5054 ("We do not believe that any scarcity rationale justifies differential First Amendment treatment of the print and broadcast media.").

Nearly eighteen years later, needless to say, these points apply with even greater force. Convergence and diversity, not scarcity, are the hallmarks of the American media landscape, so that continuing to base constitutional analysis in this area on a scarcity premise is untenable. As the current FCC Chairman has observed, "[t]he long and the short of it is this: as matters now stand, the Commission has unequivocally repudiated

spectrum scarcity as a factual matter." Joint Statement of Commissioners Powell & Furchtgott-Roth, *Personal Attack & Political Editorial Rules*, 13 F.C.C.R. 21,929, 21,940 (1998).[1] The FCC recognized as much in the order under review, emphasizing that "[t]he average American has a far richer and more varied range of media voices from which to choose today than at any time in history." App. 463a (citing "growth in available media outlets"); *see also* App. 465a ("[T]he types of media and the number of outlets within each media, except daily newspapers, have increased dramatically in the past twenty years."). Indeed, the FCC determined below that the newspaper/broadcast cross-ownership ban upheld in *NCCB* "actually works to inhibit [local news and information] programming," and prevents the efficiencies and increased quality of programming that results from "combining a newspaper's local news-gathering resources with a broadcast platform." App. 442a, 445-48a. Thus, "the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans." App. 464a.

The Third Circuit tried to sidestep this point by asserting that "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce." App. 47a. That assertion, however, misses the point on two levels.

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[1] The current FCC Chairman also announced (more than six years ago) that "the 'time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today's communications marketplace.'" *Sinclair*, 284 F.3d at 172 (Sentelle, J., dissenting) (quoting then-Commissioner Powell, *Willful Denial & First Amendment Jurisprudence*, Remarks Before the Media Institute, Washington, D.C. (Apr. 22, 1998), available at http://www.fcc.gov/Speeches/Powell/spmkp808.html). As Judge Sentelle observed, "[p]erhaps with [this] announcement ... the Supreme Court will take notice." *Id.*

On the first level, the broadcast spectrum itself is not characterized by static "scarcity." To the contrary, technological advances have increased the amount of broadcast spectrum available for use, and have allowed more intense and efficient use of that spectrum. *See, e.g., Syracuse Peace Council*, 2 F.C.C.R. at 5052-55; Christopher S. Yoo, *The Rise & Demise of the Technology-Specific Approach to the First Amendment*, 91 Geo. L.J. 245, 279-81 (2003) ("[T]echnological progress has steadily expanded the range of the electromagnetic spectrum available for commercial use."); *ACT*, 58 F.3d at 675 (Edwards, C.J., dissenting) ("[T]he nation enjoys a proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum.").[2]

On the second (and even more fundamental) level, it makes no sense to focus on broadcasting in isolation. Broadcast scarcity was relevant in *Red Lion* and *NCCB* only because the limited number of frequencies then available restricted the number of voices that could be heard on what were then the only major media of mass communication. Technological convergence has rendered obsolete the boundaries between media outlets, and broadcasters no longer are the sole or even the dominant providers of video programming. As noted above, most Americans do not even receive their broadcast programming for free through reception of over-the-air signals, but instead through subscription services such as cable and satellite systems. *See* App. 284-88a; Yoo, *supra*, at 279-80 & nn.177-79. In addition, it is now not only possible, but

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[2] Indeed, as one commentator has observed, the scarcity of broadcast frequencies at the time of *Red Lion* was a result of a series of regulatory decisions limiting the amount of spectrum allocated to broadcasting, combined with the government's decision to give away new licenses and renew existing licenses for free. *See* Yoo, *supra*, at 269-80. *Red Lion* in effect accepted the FCC's existing broadcast regulations as the "constitutional baseline" for reviewing whether additional regulations violated the First Amendment. *Id.*

increasingly common, to watch television or listen to the radio over the Internet. *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 F.C.C.R. 1606, 1673-75 (2004). To talk of broadcast "scarcity" under these circumstances thus misses the point. The current abundance of alternative outlets undermines the once-pivotal role of the broadcast spectrum in providing access to different voices.

In short, the newspaper/broadcast cross-ownership restrictions at issue should be subjected to heightened judicial scrutiny under the First Amendment, and, because they cannot remotely satisfy such scrutiny, should be invalidated.

II. This Court Should Reconsider Its Ruling In *NCCB* That The First Amendment And The Equal Protection Component Of The Fifth Amendment Require Only Deferential Review Of Cross-Ownership Restrictions Targeted At A Single Non-Broadcast Medium, Newspapers.

The sweeping changes in the communications sphere over the past generation should lead this Court to reconsider not only the scarcity doctrine, but also *NCCB*'s separate and independent holding that the differential treatment of newspapers in the cross-ownership regime does not trigger heightened judicial scrutiny. Under settled law, government restrictions that single out the press, or any element thereof (like newspapers), for differential treatment are subject to heightened judicial scrutiny under both the First Amendment and the equal protection component of the Fifth Amendment. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (citing cases); *cf. Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that Due Process Clause of Fifth Amendment includes component analogous to Equal Protection Clause of Fourteenth Amendment). Newspapers are now the *only* non-broadcast medium subject to broadcast cross-ownership restrictions.

Thus, for example, a cable company may buy a broadcast station even where a newspaper may not.

In *NCCB*, however, this Court rejected a constitutional challenge to the FCC's newspaper/broadcast cross-ownership ban on just this ground. The newspaper owners there argued that the ban "unfairly 'singled out' newspaper owners for more stringent treatment than other license applicants." 436 U.S. at 801 & n.19. The *NCCB* Court disagreed, holding that the ban "treat[ed] newspaper owners in essentially the same fashion as other owners of the major media of mass communications." *Id.* at 801. Because, in *NCCB*'s day, the only other "major media of mass communications" besides newspapers were broadcast television and radio, applying a broadcast ownership ban to the single non-broadcast medium of newspapers did not unfairly single out that medium, since similar prohibitions applied to owners of radio and television stations.

In light of the communications revolution described above, that holding is no longer tenable. Although newspapers are singled out as the only non-broadcast medium subject to a broadcast cross-ownership ban, it is no longer true that newspapers are the only non-broadcast "major medi[um] of mass communications." *NCCB*, 436 U.S. at 801. The major media outlets of today include not only cable television, but also the Internet and multichannel video program distributors like satellite and microwave services—none of which is subject to the FCC's continued restrictions on broadcast cross-ownership.

The Third Circuit, however, refused to entertain this argument, holding that it was "foreclosed" by *NCCB*. App. 45a. Because *NCCB* "endorsed the constitutionality of the 1975 newspaper/television cross-ownership ban," *id.*, the court asserted, "changing times" did not justify revisiting *NCCB*, notwithstanding the emergence of new mass media. App. 46a. As with respect to the scarcity doctrine, the court simply

declared that "it is the Supreme Court's prerogative to change its own precedent." *Id.* (citing *Khan*, 522 U.S. at 20).

As with respect to the scarcity doctrine, accordingly, Media General respectfully requests this Court to reconsider *NCCB*'s holding on this point. Again, absent reconsideration by this Court, *NCCB*'s outdated holding will remain chiseled into constitutional law notwithstanding the manifest erosion of *NCCB*'s factual premises. Even if *Red Lion* remained the law and the government had a virtually free hand to regulate broadcast media, it simply makes no sense, and should trigger heightened judicial scrutiny, for the government to subject newspapers to restrictions that are not generally imposed on other non-broadcast media. "[L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny." *Turner*, 512 U.S. at 640-41 (quoting *Ragland*, 481 U.S. at 228); *see also Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). "[D]ifferential treatment ... suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983).

Indeed, the FCC's restrictions treat newspapers even more unfavorably than radio and television broadcast stations: in mid-size markets, a broadcaster may own up to two broadcast television stations, but a newspaper owner may not. *See* App. 530-31a. And a broadcaster can acquire as many radio stations in one market as authorized by the local radio cap rule, but a newspaper owner may acquire only half that number, if it also owns a television station. *See id.* The FCC's discriminatory treatment of newspapers thus cannot remotely satisfy heightened constitutional scrutiny, and accordingly this Court should invalidate those restrictions.

III. This Court Should Reconsider Its Ruling In *NCCB* That Restrictions On Broadcast Ownership Specifically Directed At Promoting Diversity Are Content Neutral, And Thus Trigger Only Deferential Review Under The First Amendment.

Finally, separate and independent from the two grounds set forth above, the FCC's newspaper/broadcast cross-ownership restrictions should be subject to heightened judicial scrutiny for the simple reason that they are content-based. The whole *point* of those restrictions, after all, is to enhance "diversity" in broadcasting. *See* App. 225a ("[R]egulating ownership is an appropriate means to promote viewpoint diversity."); App. 453a ("[W]e continue to believe that diversity of ownership can advance our goal of diversity of viewpoint."). Because this objective necessarily relates to the *content* of the relevant speech, the restrictions are not "justified without reference to the content of the regulated speech," and are hence content-based. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Turner*, 512 U.S. at 658 (regulation content-based if "concerned with the communicative impact of the regulated speech"). And, under settled law, government restrictions based on the content of speech—no matter how benign their motivation—are subject to heightened First Amendment scrutiny. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *Ragland*, 481 U.S. at 228. Such scrutiny is particularly appropriate with respect to the cross-ownership restrictions, because there is no evidence that the content-based rationale of those restrictions is even effective in promoting a "diversity" of broadcast voices in the first place.

Again, however, this Court rejected that very point in *NCCB*. While specifically acknowledging that the premise of the newspaper/broadcast cross-ownership ban was to "enhance the possibility of achieving greater diversity of viewpoints," 436 U.S. at 796, the Court simply asserted—without

explanation—that the ban was "not content related," *id.* at 801. Not surprisingly, thus, Media General met with no success below in arguing that the cross-ownership restrictions at issue here are necessarily content related, and subject to heightened judicial scrutiny based on that ground alone. *See* App. 218a; *see also Sinclair*, 284 F.3d at 172 (Sentelle, J., dissenting) ("While there may be merit to petitioner's argument that the 'diversity' rationale is essentially content-based, and that therefore heightened scrutiny should be implicated, that argument has been rejected.") (citing *NCCB*, 436 U.S. at 799-800, and *Red Lion*, 395 U.S. at 389-91).

Because this Court conclusively resolved this issue in *NCCB*, once again it falls to this Court to remedy the situation. The *NCCB* Court appears to have blurred the line between *content* and *viewpoint* neutrality. While the newspaper/broadcast cross-ownership restrictions may not be targeted at the viewpoint of speech, that does not mean that they are not targeted at the content of speech, and does not immunize them from heightened scrutiny. *See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular *viewpoints*, but" also to regulations seeking "to restrict expression because of its message, its ideas, *its subject matter, or its content.*") (emphasis added; internal quotation omitted).

That point is entirely consistent with this Court's decision in *Turner*. That case involved the constitutionality of the FCC's "must carry" rules, which require cable owners to carry local broadcast station programming. The argument was made there that these rules were content-based because the government was forcing cable operators to transmit broadcast speech. The Court rejected that argument, holding that the rules were justified without reference to the content of the speech, but instead by reference to the structural need to protect the broadcast industry, and hence "to ensure that all Americans, especially those unable

to subscribe to cable, have access to free television programming—whatever its content." 512 U.S. at 641-52; *see also id.* at 652 ("[T]he must-carry provisions are not designed to favor or disadvantage speech of any particular content. Rather, they are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems.").

In contrast, the newspaper/broadcast cross-ownership restrictions at issue here *are* specifically designed to affect the content of speech by promoting "diversity." The key point about *Turner* for present purposes, thus, is that four Members of this Court specifically determined that an interest in promoting "diversity" is content based. *See Turner*, 512 U.S. at 678 (O'Connor, J., joined by Scalia, Thomas, and Ginsburg, JJ., dissenting). "Preferences for diversity of viewpoints," the dissent noted, necessarily "make reference to content." *Id.* at 677. "They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications." *Id.*; *see also id.* at 678 ("The interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say.").

Indeed, the justification for the newspaper/broadcast cross-ownership restrictions has an Orwellian ring. Limiting the speech of some to enhance the speech of others is fundamentally antithetical to the First Amendment. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978) (rejecting, as inconsistent with "basic tenets of First Amendment jurisprudence," the notion that the government "may control the volume of expression by the wealthier, more powerful corporate members of the press in order to enhance the relative voices of smaller and less influential members.")

(internal quotation omitted); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (*per curiam*) (emphasizing that the "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others"). The restrictions' egalitarian objectives do not diminish their sting: regardless of whether the wolf is dressed in sheep's clothing, it is still a wolf. *See, e.g.*, Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 U.C.L.A. L. Rev. 949, 957 (1995) (warning that "new speech regulators have argued in effect that speech regulation should correct for 'market failures,' break up speech 'monopolies,' redistribute relative 'speaking power,' or protect us from our existing speech 'preferences' or 'tastes.'"). The First Amendment, after all, "rests on the premise that it is government power, rather than private power, that is the main threat to free expression." *Turner*, 512 U.S. at 685 (dissenting opinion).

Because the FCC's newspaper/broadcast cross-ownership restrictions are content based, they should be subject to heightened scrutiny under the First Amendment *regardless* of whether *Red Lion*'s "scarcity" doctrine remains the law of the land. Even under the *Red Lion* regime, a content-based restriction is subject to heightened judicial scrutiny. *See League of Women Voters*, 468 U.S. 364. There, this Court struck down a statute prohibiting broadcasters from "expressi[ng] editorial opinion[s] on controversial issues of public importance," in part because "the scope of [the] ban [was] defined solely on the basis of the content of the suppressed speech." *Id.* at 381 (internal quotation omitted), 383. *League of Women Voters* thus underscores that not *all* broadcast regulation is subject to deferential review, and that "[t]he First Amendment's hostility to content-based regulation" requires the Court to be "particularly wary" in reviewing a content-based regulation of broadcasting. *Id.* at 384 (internal quotation omitted).

Because *NCCB*'s cursory and unexplained holding that newspaper/broadcast restrictions are "not content related" cannot be squared with this Court's other precedents, but will remain the law of the land absent action by this Court, this Court should reconsider that holding. And because the avowedly content-based restrictions here cannot remotely satisfy heightened judicial scrutiny, this Court should invalidate those restrictions.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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